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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE RIOS,

Defendant and Appellant.

F071842

(Super. Ct. No. DF011463A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Smith, J.

A jury convicted appellant Jesse Rios of attempted voluntary manslaughter (count 1/Pen. Code, § 664/192, subd. (a)),¹ a lesser included offense of the attempted first degree murder (§ 664/187) charged in count 1, and found true a personal infliction of great bodily injury enhancement (§ 12022.7).² In a separate proceeding, the court found true two serious felony enhancements (§ 667, subd. (a)) and allegations that Rios had two prior strikes within the meaning of the Three Strikes law³ (§ 667, subds. (b)-(i)).

On May 28, 2015, the court sentenced Rios to an indeterminate term of 25 years to life on the substantive offense and an aggregate, determinate term of 13 years on the enhancements, which were to be served consecutive to the term Rios was then serving.

On appeal, Rios contends the court abused its discretion when it ruled that he could be impeached with three in-prison assaults. We affirm.

FACTS

Background

On June 2, 2013, while serving a prison term at Kern Valley State Prison, Rios brutally assaulted his cellmate, Eladio Rubalcava.

On February 20, 2014, the district attorney filed an information charging Rios with first degree attempted murder, a great bodily injury enhancement, a personal use of a deadly weapon enhancement, two serious felony enhancements and allegations that Rios had two prior convictions within the meaning of the three strikes law.

¹ All further statutory references are to the Penal Code.

² The jury found not true a personal use of a deadly weapon enhancement (§ 12022, subd. (b)(1)).

³ The three strikes allegations and the two serious felony enhancements were based on Rios's February 2, 1994, conviction for attempted first degree burglary, and his October 25, 1994, conviction for conspiracy to commit murder. Rios was serving a sentence of 15 years to life on his conspiracy conviction and a concurrent one-year term on his attempted burglary conviction when he committed the instant offense.

On March 18, 2015, the prosecutor and defense counsel each filed motions in limine that the court heard on that date. In her moving papers, the prosecutor alleged that during his prison incarceration Rios committed 22 rules violations and she requested, in pertinent part, to be allowed to impeach Rios with his 1994 convictions for attempted burglary and conspiracy to commit murder and with the conduct underlying several violations of prison rules. The defense's motions in limine, in pertinent part, asked the court to exclude any reference or evidence relating to Rios's criminal record. The court ruled that the prosecutor could impeach Rios with his 1994 convictions and with the conduct underlying his rules violations of November 23, 1997, June 28, 2008, and April 3, 2009, each of which involved an assault on another inmate. However, although the 2009 rules violation involved an attempted murder, the court granted the defense's request to sanitize this incident by referring to it simply as an assault.

In addressing the remoteness of the convictions and conduct underlying the rule violations, the court stated:

"I don't think we have a remoteness issue because if we look back to when he was received [in prison] after the plea [to conspiracy to commit murder], he's, essentially, in trouble every year, except for a brief span, 2002 and 2003, we didn't have an entry. [¶] 2005, we didn't have an entry. [¶] But then we picked up, again, '06, '07, '08, '09, 2010, 2012 and then the incident in this particular case." [¶] So I'm not too concerned about remoteness. [¶] Obviously, he hasn't led a crime-free life since being in the state prison. [¶] I'm not too concerned about the numbers because [we have] limited [] those a great deal down to just a few 115's."

The Prosecution Case

The prosecution evidence established that on June 2, 2013, Rios shared a cell (No. 131) at Kern Valley State Prison in Delano, California, with Rubalcava, who was diabetic and used a cane to walk.⁴ Correctional Officer Jaime Mercado testified that on

⁴ At the time of the incident, Rios was 37 years old, weighed approximately 160 pounds, and was five feet nine inches tall. Rubalcava was about 57 years old, weighed approximately 265 pounds, and was approximately five feet 11 inches tall.

that date, at approximately 6:25 a.m., he began helping Correctional Officer Esteban Becerra, who was in the control booth, let diabetic inmates out of their cells so they could get in the “diabetic” line to receive their medication. After the door to cell 131 opened and Rubalcava walked out using his walking cane, Rios came out behind him and pushed him, causing Rubalcava to fall just to the right of the cell door. As Rubalcava lay on his back, Rios stomped him on the head four to five times before Officer Mercado ordered him to stop. Rios continued stomping Rubalcava in the head another three to four times before Officer Mercado sprayed him in the face with pepper spray, which caused Rios to cease the attack.

During the assault, Rubalcava did not say anything; he just lay on the ground without attempting to protect himself. Afterwards, Rubalcava lay on the ground with blood coming out of his mouth, nose and ears and he had trouble breathing. Officer Mercado did not see Rubalcava do anything to Rios prior to the attack.⁵

Officer Becerra testified that as the door to cell 131 was opening, he saw Rubalcava walk forward with a cane trying to catch his balance. At the same time, he saw Rios walking behind Rubalcava and he heard the cell door rattle as if someone were being pushed against a loose door. Becerra also saw Rios hitting Rubalcava on his back. After the scuffling stopped, Rubalcava fell to the ground and Rios began stomping him on his head even after Officer Mercado ordered him to stop. Officer Becerra did not see Rubalcava at any time hit Rios or hear him say anything. Rubalcava just lay on the

⁵ Although Correctional Sergeant Ritchie Singleton testified that he saw two to three lacerations on the side of Rubalcava’s neck, the evidence that Rios used a weapon to attack Rubalcava and that Rubalcava suffered lacerations on his neck was inconclusive. Sergeant Singleton also testified that just inside the doorway of cell 131 he found a weapon called a “tomahawk”, which consisted of two razor blades taped together.

ground and did not put his hands up to protect himself while Rios was stomping on him. Officer Becerra estimated the assault lasted approximately 50 seconds.⁶

At 1:05 p.m. that day, Rios was interviewed by Correctional Sergeant Joshua Farley and Correctional Officer Gina Marquez. During the interview, Rios stated that he had been having issues with Rubalcava regarding his cleanliness and Rubalcava being foul and disrespectful. That morning, prior to the assault, Rios was just finishing his coffee when Rubalcava let out gas. According to Rios, he punched Rubalcava a few times in the face, the cell door opened, and Rubalcava ran out of the cell. Rios's emotions got the best of him and he punched Rubalcava a few more times outside the cell. Officers arrived, told Rios to get down, and Rios moved to the side and got down. Rios acknowledged that he may also have kicked Rubalcava and that he was so upset that everything became a blur when he was punching Rubalcava outside the cell. Rios denied using a weapon and admitted that Rubalcava did not have a weapon either.

Rubalcava testified that the morning of the assault he asked Rios to leave the cell for an hour or two so Rubalcava could clean it and Rios got upset.⁷ However, they did not argue or fight. Rubalcava left his cell to wait in line get his medicine. The last thing Rubalcava recalled was getting hit in the back of the head and falling down. When he woke up he was in the hospital. Rubalcava also testified that he did not have a weapon that day.

The attack left Rubalcava with multiple facial fractures, two pelvic fractures, and intracranial bleeding that caused him to be in a coma for one to two weeks.

⁶ Officer Mercado was approximately 35 feet away from the where Rios assaulted Rubalcava; Officer Becerra was approximately 50 feet away.

⁷ The court allowed Rubalcava to be impeached with a 1988 second degree murder conviction for which he was then serving a sentence and with the conduct underlying rules violations in 2001 and 2009 for assault, in 2010 for possessing dangerous contraband (i.e., razor blades, etc.) and in 2012 for possessing a piece of metal with a sharpened point.

The Defense

Rios testified that from the first day they were housed together, Rubalcava began telling Rios he did not want him there. Rios also had trouble with Rubalcava because of Rubalcava's lack of cleanliness and lack of respect for Rios. On the morning of the assault, Rios was making coffee when Rubalcava twice let out gas and they exchanged words. Rios, however, testified to two versions of what happened just before Rubalcava exited the cell. On direct examination, Rios testified that just prior to the cell door opening, Rubalcava said something about going to "get his homeboys." This made Rios feel threatened and concerned because Rubalcava had many friends on the floor and he did not know if they would help Rubalcava or if they were going to jump Rios.⁸ Rios grabbed Rubalcava when he reached for his sock. Rubalcava then threw his hand up with the cane. Rios grabbed the cane and held it as he punched Rubalcava. Rubalcava began yelling at Rios and walked out of the cell. All Rios remembered after that was being over Rubalcava and the officers yelling for him to get down and back away. Rios backed away.

During cross-examination, however, Rios testified that Rubalcava threw up his right arm with the cane and then reached for his sock. At that moment, Rios reacted by punching him. As Rubalcava threatened to kill Rios, the cell door opened and Rubalcava ran out of the cell.

Rios denied having any weapons on him when he assaulted Rubalcava. He also claimed the tomahawk found by the door belonged to Rubalcava and that a week earlier he had seen Rubalcava with it in the cell. When interviewed about the incident by Sergeant Farley, Rios did not mention the tomahawk because in-prison snitches can be stabbed or slashed and he did not want to be labeled a snitch. However, he conceded

⁸ During cross-examination, Rios conceded that the inmates who were out of their cells at that time, were in the housing unit and not near his cell and that he did not know if these inmates were Rubalcava's friends.

during cross-examination that talking to Sergeant Farley made him a snitch. Rios also claimed that he was really shaken up when he spoke with Farley because he had never “been in a situation where something like this [had] ever happened.” Prior to his altercation with Rubalcava that day, Rios had not planned on retaliating against Rubalcava or assaulting him.

Rios admitted that during an interview with Correctional Lieutenant Timothy Sheldon, he did not tell Lieutenant Sheldon: (1) that he was scared on the day of the assault; (2) that he had seen Rubalcava possess a tomahawk for at least a week; (3) that Rubalcava picked up his cane and reached toward his sock; or (4) that Rubalcava yelled that he was going to kill Rios.

Pursuant to the court’s in limine ruling, the prosecutor impeached Rios with his 1994 convictions for attempted burglary and conspiracy to commit murder and the three in-prison assaults and he elicited from Rios the following details of the assaults. During the November 23, 1997, assault, Rios and another inmate were punching a third inmate in the face and were given multiple orders to stop but they did not comply until they were sprayed with pepper spray. During the June 28, 2008, assault, Rios and another inmate attacked a third inmate who was waiting in the pill line. Rios and the second inmate disobeyed an order to get down and were shot at with a .40-millimeter round. Although the second inmate got down at that point, Rios continued striking the third inmate on the head and upper torso. During the April 3, 2009, assault, Rios and an inmate armed with a sharp weapon over six inches long, attacked a third inmate who received 13 stab wounds. Rios was also sprayed with pepper spray during that incident.

DISCUSSION

Rios cites two comments the court made during the hearing on in limine motions to contend the court erroneously believed it should admit impeaching acts that were

similar to the charged offense.⁹ According to Rios, the court's "legal error" resulted in it allowing him to be impeached with conduct that was identical to the charged crime, i.e., the three assaults, and not particularly probative on his honesty while ignoring dissimilar conduct that was more probative on his honesty.¹⁰ He also contends that the prejudicial effect of admitting the three assaults for impeachment purposes outweighed the probative value of doing so because they were identical to the conduct charged, and this pressured the jury to conclude "if he did it before he probably did so this time." Thus, according to Rios, the court abused its discretion when it allowed him to be impeached with the three assaults. We will find that Rios forfeited his right to challenge the court's ruling. Alternatively, we will find that the court did not abuse its discretion when it allowed Rios to be impeached with three assaults and that, in any event, the court's ruling did not prejudice Rios.

***Rios Forfeited His Challenge to the Court's Ruling
Allowing Him to be Impeached with the Three Assaults***

"[A] motion *in limine* to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial

⁹ Rios cites the following comments. In discussing which conduct to admit for impeachment purposes, the court stated, "I was only looking at ... [Rios's] rules violations from November 23, 1997, and June 28, 2008, because those have to do with ... assault on inmates[.]" A little later it stated, "I know there was [disciplinary notice] from '08 about lying to officers, based upon the facts [of] this case, that doesn't seem to be an issue."

¹⁰ Rios contends that instead of the three assaults, the court could have allowed him to be impeached with a 1998 incident when he accused an officer of being a coward, cursed at him, and threatened to take care of officer when he was "on the ground," a 2008 incident when Rios falsely told an officer that he injured his back and was not able to move, and a 2009 incident when he was found in possession of a stabbing instrument.

judge can determine the evidentiary question in its appropriate context. When such a motion is made and denied, the issue is preserved for appeal. On the other hand, if a motion *in limine* does not satisfy each of these requirements, a proper objection satisfying Evidence Code section 353 must be made to preserve the evidentiary issue for appeal.” (*People v. Morris* (1991) 53 Cal.3d 152, 190 (*Morris*), overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

In the moving papers for her motions in limine, defense counsel asked the court to exclude reference to or admission of evidence concerning his “prior criminal record, including convictions and arrests” if he testified. She also objected to the admission of this evidence on the grounds that it constituted character evidence, the probative value of admitting this evidence was outweighed by the probability of undue prejudice, and its admission would violate Rios’s right to due process and a fair trial. During the hearing on the in limine motions, defense counsel never objected to the court’s ruling allowing him to be impeached with two prior convictions and three assaults.

On appeal, however, Rios contends that the court abused its discretion in allowing him to be impeached with the three assaults because: (1) for all intents and purposes, they were identical to the charged offense; (2) none of the assaults were particularly probative of his honesty; and (3) the court could have allowed Rios to be impeached with a rule violation that involved Rios’s lying rather than with the assaults. It is arguable whether or not the three assaults are part of Rios’s prior criminal record, which was the “particular, identifiable body of evidence” (*Morris, supra*, 53 Cal.3d at p. 190) that Rios’s objections were directed at. However, it is clear that Rios did not advance in the trial court the three grounds, noted above, for excluding the three assaults that he now advances on appeal. Thus, we conclude that Rios forfeited his challenge to the court’s ruling allowing him to be impeached with the three assaults. However, even if Rios’s contention were properly before us, we would reject it.

The Court Did Not Abuse its Discretion When It Admitted Evidence of the Three In-Prison Assaults for Impeachment Purposes

“A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court’s exercise of discretion under Evidence Code section 352. [Citations.]

“ ‘[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad.’ [Citations.] When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness’s honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant’s decision to testify. [Citations.] Additional considerations apply when the proffered impeachment evidence is misconduct other than a prior conviction. This is because such misconduct generally is less probative of immoral character or dishonesty and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude. [Citation.] As we have advised, ‘courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.’ [Citation.]

“Because the court’s discretion to admit or exclude impeachment evidence ‘is as broad as necessary to deal with the great variety of factual situations in which the issue arises’ [citation], a reviewing court ordinarily will uphold the trial court’s exercise of discretion.” (*People v. Clark* (2011) 52 Cal.4th 856, 931-932.)

Probative Value

“The California Supreme Court has divided crimes of moral turpitude into two groups. [Citation.] The first group includes crimes in which dishonesty is an element (i.e., fraud, perjury, etc.). The second group includes crimes that indicate a ‘ “general readiness to do evil,” ’ from which a readiness to lie can be inferred. [Citation.] Crimes in the latter group are acts of ‘baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.’ [Citation.] ‘Although the inference is not as compelling in the latter case, “it is undeniable that a witness’s moral depravity of any kind

has some ‘tendency in reason’ [citation] to shake one’s confidence in his honesty.” ’ ’ (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28-29.)

Burglary is a crime of moral turpitude (*People v. Hunt* (1985) 169 Cal.App.3d 668, 675), as is murder (*ibid.*), and conspiracy to commit murder (*People v. Garrett* (1987) 195 Cal.App.3d 795, 800 [conviction for conspiracy to commit crime involves moral turpitude when the conspiratorial agreement encompasses as its object a crime involving moral turpitude]). Assault by means of force likely to cause great bodily injury is also a crime of moral turpitude. (*People v. Elwell* (1988) 206 Cal.App.3d 171, 177.) Therefore, Rios two convictions and his three in-prison assaults were probative on the issue of his credibility.

Remoteness

At trial, Rios’s 1994 convictions for conspiracy to commit murder and burglary were approximately 21 years old and his 1997 assault conviction was approximately 18 years old. “However, convictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior.” (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.) Since being incarcerated in 1994, Rios had been in trouble every year except 2002, 2003, and 2005 in accumulating more than 22 rules violations. Thus, the age of Rios’s 1994 convictions and his 1997 assault did not detract from their probative value. (Cf. *People v. Green* (1995) 34 Cal.App.4th 165, 183 (*Green*) [the court admitted a 20-year old prior conviction for impeachment purposes].)

Similarity and Numerosity of Convictions

“Prior convictions for the identical offense are not automatically excluded. ‘The identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion.’ ” (*Green, supra*,

34 Cal.App.4th at p. 183.) Further, “a series of crimes may be more probative than a single crime[.]” (*Ibid.*)

The jury had the option to convict Rios of attempted first degree murder or attempted voluntary manslaughter, a lesser included offense, or to acquit him of these charges. Attempted first degree murder and attempted voluntary manslaughter each required Rios to have the specific intent to kill. (CALCRIM Nos. 600 & 603.) As presented to the jury, the three in-prison assaults did not attribute to Rios the specific intent to kill the victim of any of the assaults. Thus, the conduct involved in the three assaults was not identical to the conduct underlying the attempted murder or the lesser included offense of attempted voluntary manslaughter offense the Rios jury had to consider.

But even assuming the conduct was identical, the court exercised considerable restraint in allowing Rios to be impeached with only two convictions and three assaults. Further, given the numerous in-prison incidents Rios was involved in that spanned his entire prison incarceration, impeachment with less than the two convictions and three assaults would have allowed Rios to testify with a “ ‘false aura of veracity.’ ” (Cf. *People v. Muldrow* (1988) 202 Cal.App.3d 636, 646, 647 [admission of less than six prior convictions including three that were identical to the charged offense, would have allowed the defendant to testify with false aura of veracity].) Thus, the court did not abuse its discretion because it admitted Rios’s conspiracy conviction and the assaults for impeachment purposes even though they involved conduct that was similar to the charged offense.

Adverse Impact on Rios’s Right to Testify

This factor was not an issue because Rios testified at the trial. Thus, we conclude that the court did not abuse its discretion when it allowed the prosecutor to impeach Rios with his 1994 convictions and the three in-prison assaults.

Rios Was Not Prejudiced by the Admission of the Three Assaults

“A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: ... the error or errors complained of resulted in a miscarriage of justice.” (Evid. Code, § 353.) “No judgment shall be set aside, or new trial granted, in any cause, on the ground ... of the improper admission or rejection of evidence, ... unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13.) “... [A] miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1170.)

Even if the court erred in admitting the three assaults for impeachment purposes the error was harmless. The court correctly allowed the prosecutor to impeach Rios with the 1994 convictions. Had the court not admitted the three assaults for impeachment purposes, it is clear that it would have allowed the prosecutor to impeach him with the conduct underlying three other incidents that Rios concedes had “equal or better impeachment value.” Additionally, the court limited the jury to considering the three assaults only in assessing Rios’s credibility by charging them with CALCRIM No. 316, which instructed the jury to consider the evidence of past misconduct only in evaluating the credibility of a witness’s testimony.

Moreover, it does not appear that the jury improperly considered the three assaults as character evidence because they acquitted Rios of attempted first degree murder, the most serious charge he faced, and they found the arming enhancement not true. Further, in order for the jury to have acquitted Rios of attempted voluntary manslaughter, the jury would have had to find that Rios acted in self-defense. (CALCRIM No. 3470.) To do this, the jury would have had to find that: (1) Rios reasonably believed he was in imminent danger of suffering bodily injury or of being touched unlawfully; (2) Rios reasonably believed the immediate use of force was necessary to defend against the

danger; and (3) he used no more force than was necessary to defend against the danger. (CALCRIM No. 3470.) Conversely, if the jury found Rios used more force than necessary or that he continued to use force after the danger no longer existed or after it appeared Rubalcava was no longer capable of inflicting any injury, it would have had to conclude that Rios did not act in self-defense. (*Ibid.*; CALCRIM No. 3474.)

Rios's testimony provided the only evidence that he acted out of fear when he brutally beat the victim outside their cell. However, when interviewed by Sergeant Farley on the day of the assault, Rios admitted he assaulted the victim because of the ongoing conflict they had. Further, during the interviews with Sergeant Farley and Lieutenant Sheldon, he did not claim that he was in fear, that he believed the victim was armed, nor did he claim that he acted in self in self-defense. Rios also testified to two substantially different versions of what led up to the brutal beating of Rubalcava. Thus, it is extremely unlikely the jury would have found he acted in self-defense when he assaulted Rubalcava even if he had not been impeached with the three assaults.

In any event, Rios's testimony, at most, established that he had an honest but unreasonable belief that he had the right to self-defense. Although Rios claimed he feared Rubalcava was exiting the cell to get his friends to help him assault Rios, he admitted he that the inmates who were out of their cells at the time were in the day room and not near his cell. Thus, Rios's own testimony established that the possibility that Rubalcava might attempt to recruit his friends to assault him did not present a threat of such imminent harm that justified the brutal beating Rios inflicted on Rubalcava.

Moreover, based on the ferocity of the attack and Rubalcava's physical condition, it was unlikely the jury would conclude from Rios's testimony that after knocking him down, Rios needed to viciously stomp on Rubalcava's head in order to defend himself from him. Further, Rubalcava never fought back and it should have been obvious to Rios that Rubalcava was disabled, if not unconscious, after the first time Rios stomped Rubalcava on the head as he lay on the ground. Rios, however, continued stomping on

Rubalcava even after he was ordered to stop by Officer Mercado. Since Rios's own testimony established that he continued severely beating Rubalcava long after he was no longer a threat, it is extremely unlikely the jury would have acquitted him of attempted voluntary manslaughter even if the court had not allowed him to be impeached with the three in-prison assaults. Thus, we conclude that any error in the court allowing Rios to be impeached with these assaults was harmless.

DISPOSITION

The judgment is affirmed.